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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK VASQUEZ,

Defendant and Appellant.

F078636

(Super. Ct. No. PCF310023)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Glade F. Roper, Judge.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J. and Meehan, J.

Following a jury trial in which appellant Frank Vasquez represented himself, the jury found him guilty of first degree murder (Pen. Code, § 187, subd. (a);¹ count 1) for the 2014 shooting death of Juan Carlos Ibarra. The jury also found him guilty of second degree robbery (§ 211; count 2) and being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 5). The jury found true that the first degree murder was committed during the commission of the robbery (§ 190.2, subd. (a)(17)(A)), and it found true that appellant personally and intentionally discharged a firearm during these crimes (§ 12022.53, subd. (d)). The jury, however, acquitted appellant of attempted robbery involving another man present during the fatal encounter (§§ 211/664; count 3).²

The trial evidence established that appellant shot Ibarra with a shotgun. Just prior to firing, appellant demanded money from Ibarra. After fatally wounding Ibarra, appellant took his wallet. Ibarra's fatal shooting occurred in Tulare County, and witnesses observed the events. About five days after Ibarra's murder, law enforcement detained appellant in Monterey County. He had a packed suitcase in his vehicle. At trial, two eyewitnesses identified appellant as Ibarra's shooter. Two other witnesses provided corroborating testimony that confirmed appellant's identity as Ibarra's murderer. Appellant testified on his own behalf without the assistance of legal counsel. He claimed that he was not present when this fatal shooting occurred.

In count 1, appellant was sentenced to life in prison without the possibility of parole (LWOP) for the murder, plus an additional aggregate term of 32 years to life. In count 2, the trial court imposed an aggregate consecutive prison term of 17 years, plus 25 years to life for the robbery. Finally, in count 5, the court imposed an aggregate term of

¹ All future statutory references are to the Penal Code unless otherwise noted.

² Prior to the jury's deliberations, count 4 was dismissed. This count had alleged the attempted robbery of another man present at Ibarra's murder.

eight years for being a felon in possession, and this sentence was stayed pursuant to section 654.

In 2015, appellant appealed, raising numerous issues. In an unpublished opinion, we affirmed the judgment but remanded the matter for resentencing. We agreed with the parties that certain sentence enhancements attached to counts 1, 2, and 5 had not been proven beyond a reasonable doubt. Following remand, however, we gave the prosecution the option to try appellant on those sentence enhancements. The trial court was also directed to exercise its new sentencing discretion pursuant to section 12022.53, subdivision (h), and determine whether it should strike or dismiss the firearm enhancements. (*People v. Vasquez* (Feb. 21, 2018, F072736).)

Following remand, the prosecution announced it was not ready to proceed on trying the sentence enhancements attached to counts 1, 2, and 5. The trial court dismissed those allegations. On November 1, 2018, the court resentenced appellant. In count 1, the court again imposed LWOP for the murder (§ 187, subd. (a)), along with an additional and consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). In count 2, the court imposed the upper term of five years for the second degree robbery (§ 211), plus an additional 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). In count 5, the court imposed a concurrent upper term of three years for being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The sentence for count 5 was again stayed pursuant to section 654.

Following the 2018 resentencing, appellant's counsel filed a brief with this court that summarized the facts with citations to the record. The brief raised no issues, but it asked this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) In May 2019, we advised appellant of his right to file a supplemental brief.

On May 31, 2019, appellant filed a supplemental brief. He contends that, following his convictions, he was denied the right to forensic deoxyribonucleic acid

(DNA) testing pursuant to section 1405.³ Appellant asserts that, after becoming a prisoner, he initiated a petition in the superior court pursuant to section 1405. Based on an exhibit attached to appellant's supplemental brief, it appears that, on May 5, 2016, the superior court appointed counsel for appellant (the 1405 counsel) "to investigate and, if appropriate, to file a motion for DNA testing under [section] 1405 and to represent [appellant] solely for the purpose of obtaining DNA testing under [section] 1405."

In his supplemental brief, appellant complains that his 1405 counsel improperly failed to pursue the post-conviction DNA testing. Appellant contends that "a bloody latex glove" was discovered at Ibarra's murder scene, which was not tested for DNA. Based on a letter which appellant attached to his supplemental brief, it appears that the 1405 counsel determined that insufficient grounds existed to file a motion for post-conviction DNA testing pursuant to section 1405.

In his supplemental brief, appellant asks this court to issue an order (presumably directed at the 1405 counsel) to prepare the motion pursuant to section 1405. In the alternative, appellant asks this court to issue an order for the superior court to conduct a hearing regarding why the 1405 counsel refused to pursue such a motion. Finally, appellant seeks an order prohibiting the district attorney's office from destroying or withholding the "physical and biological evidence in question."

We have conducted an independent review of the entire appellate record. We determine that no arguable factual or legal issues exist. (See *People v. Wende, supra*, 25 Cal.3d at p. 443.) The arguments and claims which appellant raise in his supplemental brief are not cognizable on appeal because his assertions rely on facts outside this

³ Section 1405 gives a convicted felon currently serving a term of imprisonment the ability to file a written motion for the performance of DNA testing. The motion must be filed before the trial court that entered the judgment of conviction. (§ 1405, subd. (a).) An indigent convicted person may request appointment of counsel to prepare such a motion. (*Id.* at subd. (b)(1).)

appellate record. (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534 [“An appellate court’s review is limited to consideration of the matters contained in the appellate record.”].) Our review on direct appeal is limited to the appellate record and an appellate court is generally not the forum in which to develop additional facts. (*People v. Jenkins* (2000) 22 Cal.4th 900, 952–953.) Because appellant’s supplemental brief raises issues dependent upon evidence and matters not reflected in the record on appeal, we will not address those contentions at this juncture.⁴ (*Jenkins*, at p. 952.)

DISPOSITION

The judgment is affirmed.

⁴ “A habeas corpus proceeding, of course, appropriately may develop a record beyond the record on appeal.” (*People v. Jenkins, supra*, 22 Cal.4th at p. 953.)